

ETHICS COMMITTEE

DATE: October 8, 2009

CALLED TO ORDER: 5:32 p.m.

ADJOURNED: 6:26 p.m.

ATTENDANCE

ATTENDING MEMBERS

Ginny Cain, Chairwoman
José Evans
Robert Lutz
Brian Mahern
Mary Moriarty Adams
Kent Smith

ABSENT MEMBERS

AGENDA

Discussion of possible procedures for the Ethics Committee

ETHICS COMMITTEE

The Ethics Committee of the City-County Council met on Thursday, October 8, 2009. Chairwoman Ginny Cain called the meeting to order at 5:32 p.m. with the following members present: Robert Lutz, Brian Mahern, and Mary Moriarty Adams. José Evans and Kent Smith arrived shortly thereafter. General Counsel, Robert Elrod, represented Council staff.

Chairwoman Cain said that the Committee will be looking at an official draft of the procedures for the investigation of allegations of violations of ethical standards for City County Councillors (attached as Exhibit A). She asked the members of the Committee to introduce themselves. Chairwoman Cain asked Mr. Elrod to discuss the details of Exhibit A.

Mr. Elrod said this draft consists of the things that were in the outline that was discussed in the previous Ethics meetings. He read through the draft and gave details of each section. He said the first section deals with how allegations are made, with sub-sections (a), (b) and (c) addressing three different circumstances in which an allegation might be made.

Councillor Mahern asked if allegations of violations by Councillors and by those other than Councillors are treated differently. Mr. Elrod answered in the affirmative, and stated that the processes are slightly different, but he supposes that sub-sections (b) and © could be combined.

Mr. Elrod said that sub-section (f) is necessary so that the political balance of the Committee is not changed while the allegations are being investigated on a Councillor that serves on the Committee.

Mr. Elrod said that Sections 151-1124, 151-1125, and 151-1126 detail the procedures with respect to an informal review and informal hearing, followed by a formal hearing, if necessary. He read through each section, and said the initial review will determine if the issue needs a more formal process without the Committee being required to do so. Mr. Elrod said, with respect to Sec. 151-1124 (d), that a Councillor may want to admit to a wrongdoing before the formal hearing and accept some form of sanction. He said the Committee would still need to decide whether or not the offer is appropriate. He said that Sec. 151-1125 (a) allows the Committee to hold an executive session to look at the complaint, general counsel's report and any responses by the complainant before deciding what to do.

Councillor Mahern asked at what point in the process the allegation would become public. He said that Sec. 151-1125 (a) does not seem to provide much protection if allegations are unfounded. He also asked what the purpose is in deliberating in an executive session when all of the preliminary facts will already be known. He said he is concerned that if there is a frivolous complaint, allegations are made and all the information is made public, it would be hard to go backward. In addition, Councillor

Mahern asked what the threshold is for which an accusation is treated with validity. Mr. Elrod answered that he believes everything would go public after the informal hearing. He said this section gives the Committee the ability to try to be confidential about the information if an executive session is chosen. He said the problem is that the information will probably be given to the press before this point if the person making the allegation is one who is trying to make a political impression. Councillor Mahern said that he feels there is a difference in stating that there is a pending ethical investigation as opposed to accusations that are made about what someone did.

[Clerk's note: Councillor Evans arrived at 5:48 p.m.]

Councillor Mahern asked if the Committee would have the ability to review accusations in the greatest amount of confidentiality to come to a consensus about the validity of an allegation. Chairwoman Cain said that her understanding is that the executive session is for the purpose of protecting the details, especially if there will be no formal hearing. Mr. Elrod agreed with Chairwoman Cain. Councillor Mahern asked if the filing of the complaint and the report prepared by the general counsel are considered public. Mr. Elrod said he does not consider those to be public documents, and there probably needs to be a discussion about how to handle it. He said in order to make the documents non-public, this will need to be written in a way that complies with the open door policy or the public information act, so that the information does not have to be disclosed by request. Mr. Elrod said that he is sure that the general counsel's report can be kept confidential as an attorney's communication with the Committee, and does not have to be made public unless the Committee decides to release it. He said he is not sure how the complaint itself can be kept confidential, because the person making the complaint can freely give the information before it is filed.

[Clerk's note: Councillor Smith arrived at 5:57 p.m.]

Councillor Mahern asked what can be done to combat someone constantly filing frivolous complaints against a particular Councillor or group of Councillors, especially with respect to complaints filed by the public. He asked if there should be a provision where accusations can only be made by Councillors and if someone from the public wants to file a complaint, they would have to go through a Councillor. Chairwoman Cain said that she feels that the option to file an accusation should be kept open to the public. Councillor Mahern said that his concern with that is that there are a lot of things said and written on the internet that have absolutely no basis. This enables people to simply sling allegations. He said that he is confident that Councillors can exercise the judgment of knowing when allegations should or should not be made. Councillor Mahern said that the Committee should define that the purpose is to ensure that there is ethical behavior by the Council. He said that the Council is being charged with overseeing themselves in between elections. Mr. Elrod said that the question is if the Committee is going to do anything about a public allegation of misconduct or wait until the election. Councillor Mahern said the issue is that the public can simply make allegations and walk away, even though those allegations may be frivolous.

Chairwoman Cain said that the public also has to sign, under threat of perjury, that what they are saying is true. This is to keep people from making up things and to hold them accountable.

Councillor Lutz said that he agrees with Councillor Mahern because, unfortunately, people do make up things, as some statements that are stated and posted on blogs have no basis. He said this can be an issue because you cannot undo the statements, and people love scandals. It could also be that the person honestly believes that their allegations are true. He said that maybe general counsel should serve as gatekeeper.

Mr. Elrod said that if the Committee is not going to do the informal hearing as a way of filtering those instances out and is only going to allow Councillors to file complaints, then the Committee should eliminate the informal hearings. He asked if any one Councillor would defer to six other Councillors to review accusations against them. Councillor Mahern answered that in many respects, the Committee has been granted that authority. He said the Committee will eventually hear the allegations after it is determined that they are substantive.

Councillor Mahern said that another reason that he feels that only Councillors should be able to file complaints, is because the public is not able to introduce proposals or vote on them either. He said that he feels that the maximum amount of protection in terms of confidentiality needs to have an allegation brought through a Councillor and confidentiality maintained for consideration by the Committee. He said that there should be an understanding that the real ramification is not political, but is public policy, because the allegations will be serious, no matter how minor they appear.

Chairwoman Cain said the question is how long the information is kept confidential. Mr. Elrod said that the first thing is to take some things out of the draft if only Councillors will file the complaints.

Councillor Mahern moved, seconded by Councillor Evans, to direct general counsel to edit the draft in whatever form necessary to reflect that only Councillors will have the ability to make ethical allegations against another Councillor or Councillors. Chairwoman Cain said that this makes sense and keeps the consistency of who is allowed to enter into the everyday business of the Council. The motion carried by a vote of 6-0.

Mr. Elrod said that the first thing he will do is take out Sec. 151-1121 (c), and then he will take other things out as they no longer apply.

Councillor Moriarty Adams asked what "ranking member" means, as stated in Sec. 151-1121 (e). Mr. Elrod said that he feels that should be the person who has seniority on the Council. He said this keeps it from being a political decision with an evenly balanced committee, as the mix of the members of the Committee should be protected.

Councillor Smith asked if the words "ranking member" should be changed to something more specific to seniority. Mr. Elrod agreed.

Mr. Elrod said that there may also need to be some language included about disclosing the information of a third party if the complaint is coming from someone outside the Council.

Councillor Lutz said that the language in Sec. 151-1122 may need to be changed to reflect that there is a good faith belief that a statement is true and accurate, with respect to accepting an allegation from an outside party. Councillor Smith said that maybe there could be a requirement of a statement from the person making the allegation.

Mr. Elrod said that he believes that the language in Sections 151-1124 and 151-1125 is okay if the Committee feels that informal reviews are still necessary. Councillor Mahern said that he believes that informal reviews should still be applicable in order to have the ability to keep the allegations confidential until there is evidence of an actual violation. He said he would like to have the minority counsel review the draft before anything is introduced to the full Council. Mr. Elrod said that he believes the current language in the draft is close to what the Committee expects.

Councillor Mahern asked if the statement of allegation would be considered to be public. Mr. Elrod answered that he needs to do more research to see how long the allegation can be kept confidential according to the public records law. He said he does know that there is a provision in the open door law that allows an executive session to review allegations of misconduct. He said he believes this allows the executive session to look at the information, but it is clear that action must be taken in a public session and cannot be done in the executive session.

Chairwoman Cain said that she would like for the allegations to be confidential up to the point where a public vote has to be taken. She asked if this is possible. Mr. Elrod answered that he believes that is acceptable.

Councillor Mahern said that he believes that the greater risk is an unfounded allegation, but he believes that the process will reveal a true allegation. Mr. Elrod said that he will look into what information has to be released, as he had not focused on the issue of what has to be released if the allegation is unsubstantiated.

Councillor Moriarty Adams said that the words "public vote" in Sec. 151-1125 (b) could be confusing to people, as it could indicate that the vote is up for the public to decide. Mr. Elrod agreed and said that he can clarify that wording.

Chairwoman Cain said that the Committee cannot control the action of complainants and the media. Mr. Elrod said that there are two legal issues. One is the open door law, which applies to when the Committee can meet and whether or not the press and the public can be excluded from a hearing. He said there are penalties for violating this

law. The other issue is the public records law, which has to do with whether or not the public has a right to look at the record of an elected official. Mr. Elrod said that the two laws do not particularly match.

Councillor Evans asked, with respect to Sec. 151-1125 (e), if there should be a specification of what happens if a majority decision is not met. For instance, if after 30 days it falls off the table or is automatically sent to the full Council. Councillor Moriarty Adams asked if it should be treated like a pending proposal that stays on the table for a specified period of time. Mr. Elrod answered that it should probably state that the matter will be forwarded to the formal hearing if not agreed upon within a certain period of time.

Chairwoman Cain said that a couple of the Councillors on the Committee have to leave due to prior commitments. She asked if the Committee would like to adjourn. The Committee answered in the affirmative.

Mr. Elrod said that there is one other substantial decision that needs to be thought out. He said Sec. 151-1128 (a) assumes that the Committee has reached a decision and recommended a sanction or dismissal. He said that this action must be confirmed by the full Council. Sub-section (a) allows for the accused Councillors to appeal the decision before the full Council. Mr. Elrod said that this sub-section has been written to allow the Council to make a decision to hear the appeal by reviewing the record or by hearing it all over again. He asked the Committee to think about whether or not to keep it written that way or choose one way over the other.

There being no further business, and upon motion duly made, the meeting was adjourned at 6:26 p.m.

Respectfully Submitted,

Ginny Cain, Chairwoman

GC/nsm

DRAFT PROCEDURES FOR
INVESTIGATION OF ALLEGATIONS OF
VIOLATIONS OF ETHICAL STANDARDS

Sec. 151-1121. Allegations of violations of ethical standards.

(a) An allegation by a Councillor of violations of ethical standards by a Councillor during a meeting of the Council or any committee of the Council shall be made by the Councillor stating the allegation which shall be noted in the minutes. No further statement of allegation is required, but the Councillor making the allegation may file a further statement of allegation that complies with Sec. 151-1122. The allegation shall be referred to the chairperson of the Ethics Committee by the president of the Council if made during a Council meeting or by the chairperson of the committee if made during a committee meeting. The chairperson of the Ethics Committee shall provide copies of the allegation to the members of the Ethics Committee and the Councillor against whom the allegation is made.

(b) An allegation of violations of ethical standards by a Councillor with respect to conduct of a Councillor not during a meeting of the Council or a Council committee shall be made by filing a statement of allegation that complies with Sec. 151-1122 with the Clerk of the Council. The Clerk shall refer the statement of allegation to the chairperson of the Ethics Committee and send copies to the Councillor against whom the allegation is made, the president of the Council and all members of the Ethics Committee.

~~(c) An allegation of a Councillor's violation of ethical standards by anyone other than a Councillor shall be made by filing a statement of allegation that complies with Sec. 151-1122 with the Clerk of the Council. The Clerk shall refer the statement of allegation to the chairperson of the Ethics Committee and send copies to the Councillor against whom the allegation is made, and all members of the Ethics Committee.~~

(d) As used in this division, "Complainant" means the person alleging the violation, and "Respondent" means the Councillor against whom the allegation is made.

(e) If the Respondent or the Complainant is the chairperson of the Ethics Committee, the ~~ranking member~~ of the Committee shall fulfill the duties of the chairperson with respect to such statement of allegation.

change (f) If a member of the Ethics Committee is the Respondent, the Committee on Committees shall name another Councillor of the same political party to serve during the consideration of the statement of allegations.

Sec. 151-1122. Statement of Allegation. The statement of allegation shall contain the following:

(1) A description of the conduct by the Councillor that is alleged to be a violation of the ethical standards and the standard of conduct that applies.

(2) The time and place the alleged conduct occurred.

(3) The names of other persons present when the conduct occurred.

(4) The full name, address and phone numbers of the Complainant.

(5) Any documents which form the basis of the allegation.

(6) An affirmation under penalties of perjury that the statement of allegation is true.

Sec. 151-1123. Referral of Statement of Allegation.

(a) The Clerk of the Council, within ten days of the filing of the statement of allegation or notation of allegation by a Councillor in the minutes, shall refer the matter to the chairperson of the Ethics Committee.

(b) The chairperson of the Ethics Committee, shall set a date for an informal review of the matter by the Ethics Committee not later than thirty days after the alleged violation occurred.

(c) The chairperson shall forward the statement of allegation or notation in the minutes to the general counsel, who shall issue an opinion under Sec. 151-1124.

(e) Notice of the action taken by the chairperson shall be given to the Complainant, the Respondent and the members of the Ethics Committee.

Sec. 151-1124. Filings prior to informal review.

(a) After receiving the statement of allegation for review under Sec. 151-1123, the general counsel shall:

(1) inquire into the facts and law regarding the statement of allegation, and

(2) issue an opinion on whether the statement of allegations, if true, warrants a formal hearing or does not raise a substantial issue of violation of ethical standards.

(b) The general counsel shall prepare the opinion within the time specified by the chairperson of the Ethics Committee, which shall be not later than 5 days prior to the informal hearing, and deliver copies of such report to the members of the Ethics Committee, Complainant, and Respondent.

(c) The Respondent may file a response to such report with the Ethics Committee which may include a proposed sanction. Such response shall be forwarded to the Complainant.

(d) Should the Respondent propose a sanction, the Complainant may file a statement in support or opposition to the proposed sanction.

Sec. 151-1125. Informal Hearing.

(a) The Ethics Committee may convene an executive session to deliberate on the statement of allegation and accompanying filings.

(b) The Ethics Committee shall take a public vote on whether to proceed with a formal hearing.

(c) If the Ethics Committee agrees to proceed without a formal hearing, it shall:

(1) Dismiss the statement of allegation for failure to allege a substantial issue of violation of ethical standards, or

(2) Recommend the sanction as proposed by Respondent.

(d) If the Ethics Committee votes to proceed with a formal hearing on the statement of allegation, the hearing shall be scheduled before the committee not later than thirty days after the informal review, unless the Respondent agrees to a later date.

(e) If the committee cannot reach a majority decision on how to proceed, the matter shall remain pending before the committee until a majority adopts a recommendation.

Sec. 151-1126. Formal hearing on statement of allegation.

(a) The general counsel shall preside over the Ethics Committee during the formal

hearing, but shall have no vote. Ruling of the presiding officer shall be appealable to the committee

(b) Respondent may file a formal response to the statement of allegations, if filed five days before the start of the hearing.

(c) Complainant shall present evidence to support the statement of allegation. Complainant may be represented by counsel employed by Complainant.

(d) Respondent may present evidence in response to Complainant's evidence. Respondent may be represented by counsel employed by Respondent.

(e) The hearing shall be open to the public, and a transcript of the hearing preserved..

Sec. 151-1127. Action after formal hearing.

(a) At the conclusion of the formal hearing, the Ethics Committee shall adopt a recommendation for the full Council.

(b) The committee may recommend:

(1) That the Complainant failed to prove Respondent was in substantial violation of the ethical standards, and that no sanction be imposed,

(2) That sanction be imposed as proposed by the Respondent,

(3) That the Respondent be censured,

(4) That the Respondent forfeit council offices or committee assignments,

(5) That the Respondent forfeit per diem compensations, or

(6) That the Respondent be removed from office by the council.

(c) If the committee cannot reach a majority decision on the adoption of a recommendation, the matter shall remain pending before the Ethics Committee until a majority adopts a recommendation.

(d) Any recommendation adopted by the Ethics Committee shall be reported in writing to the Council and a proposal for a resolution adopting such recommendation placed on the agenda of the Council at its next meeting.

Sec. 151-1128. Action by council.

(a) Respondent has the right to appeal to the Council any recommendation by the Ethics Committee and request a hearing. Such request shall be filed with the Clerk of the Council within 10 days after the Ethics Committee adopts its recommendation. On filing of the appeal the Clerk shall forthwith prepare a transcript or video record of the committee hearing, along with all exhibits and minutes of the hearing and committee deliberations and deliver copies to each councillor.

(b) If an appeal is filed by Respondent, action on the committee report and resolution shall be postponed until after the hearing is concluded.

(c) At the first regular meeting of the council after an appeal is filed, the council by simple majority vote of those voting shall decide whether the appeal shall be held on the record of the Ethics Committee hearing or a hearing de novo shall be held. The president of the Council shall schedule such hearing before the Council at a regular or called meeting within 30 days of the filing of the request by Respondent.

(d) If the council schedules a hearing on the record, no additional evidence shall be

received at the hearing. The Respondent and Complainant shall each have fifteen minutes to present arguments on the appeal.

(e) If a hearing de novo is granted:

(1) the president may preside, or if he be the Respondent, the vice-president, or may appoint another qualified person to preside, who shall not have vote unless a Councillor,

(2) the presiding officer, with consent of the Council, may establish reasonable limits for presentation and closing arguments,

(3) Complainant shall present evidence to support the statement of allegation. Complainant may be represented by counsel employed by Complainant.

(4) Respondent may present evidence in response to Complainant's evidence. Respondent may be represented by counsel employed by Respondent.

(5) Complainant and Respondent shall in order be allowed closing arguments.

(6) the hearing shall be open to the public.

(c) The Council shall act on the recommendation of the Ethics Committee by adopting the recommendation, modifying the recommendation, or determining that no action be taken.

Sec. 151-1129. Procedural matters.

(a) The general counsel, Complainant or Respondent may request the Ethics Committee to issue subpoenas for the production of documents or attendance of witnesses at the formal hearing, pursuant to IC 36-3-4-24.

(b) The Ethics Committee may grant or deny requests for subpoenas at its discretion.

(c) Should a person fail to comply with a subpoena issued by the committee, the committee shall refer the matter to the Council for enforcement pursuant to IC 36-3-4-24(d).

(d) The Ethics Committee or the Council may at any time table proceedings with respect to a statement of allegation if it finds:

(A) the prosecutor or other law enforcement agency requests deferring the matter pending investigation or court proceedings, or

(B) the Respondent is likely to assert a privilege against self-incrimination which would materially affect the Complainant's ability to produce evidence of the alleged ethical violation.